

ORIGINAL

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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MAY 31 2002

In the Matter of)	EB Docket No. 02-21	FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
Peninsula Communications, Inc.)		
Licensee of stations	)	File No. EB 01-IH-0609	
KGTL, Homer, Alaska;	)	FRN: 0001-5712-15	
KXBA(FM), Nikiski, Alaska;	)	Facility ID Nos. 52152	
KWVV-FM, Homer, Alaska; and	)	86717	
KPEN-FM, Soldotna, Alaska.	)	52145	
	)	52149	
Licensee of FM translator stations)		
K292ED, Kachemak City, Alaska;	)	52150	
K285DU, Homer, Alaska;	)	52157	
K285EG and K272DG, Seward, Alaska	)	52158 and 52160	
Licensee of FM translator stations)		
K285EF, Kenai, Alaska;	)	52161	
K283AB, Kenai/Soldotna, Alaska;	)	52155	
K257DB, Anchor Point, Alaska;	)	52162	
K265CK, Kachemak City, Alaska;	)	52154	
K272CN, Homer, Alaska; and	)	52148	
K274AB and K285AA, Kodiak, Alaska	)	52151 and 52164	

To: The Enforcement Bureau

OPPOSITION TO THE MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Peninsula Communications, Inc. ("PCI"), by its undersigned counsel, hereby respectfully submits this Opposition to the "Motion To Compel Production Of Documents" (hereafter the "Motion"), filed on May 22, 2002, by the Enforcement Bureau (hereafter the "Bureau"). PCI submits that it has fully responded to the legitimate document production requests by the Bureau, and has appropriately objected to those

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productions requests that are unreasonable, beyond the scope of the designated issues in this proceeding, and unlikely to lead to the discovery of any evidence that is either relevant to the issues in this proceeding, or admissible in evidence therein.¹ In support of this Opposition, the following is respectfully submitted for the consideration of the Presiding Judge.

I. BACKGROUND

1. The subjects of this proceeding are seven (7) FM translators in the State of Alaska that were licensed to, and are currently operated by, PCI. The issue before the Presiding Judge at this time involves the effect of PCI's continued operation of these FM translators subsequent to August 29, 2001, on PCI's character qualifications to be a Commission licensee. PCI operates several full power AM and FM stations in the State

¹ As a preliminary matter, PCI objected to the "time frame" referenced in "Instructions", paragraph "g" to the Bureau's document production request. That paragraph proposed the time frame from January 1, 2000 to the present. However, the designated issue in this proceeding limits the time frame upon which PCI will be judged to a discreet and specific period "... subsequent to August 29, 2001..." See, Order To Show Cause, FCC 02-32, released February 6, 2002, at paragraph 6 (a). Therefore, PCI objected to producing documents that existed before the designated commencement date of inquiry as irrelevant to the matters at issue in this proceeding, and as merely an attempt by the Bureau to unduly expand the scope of the inquiry to matters that are not relevant in the instant proceeding. As a preliminary matter, PCI objects to the "time frame" referenced in "Instructions", paragraph "g." That paragraph proposes the time frame from January 1, 2000 to the present. However, the designated issue in this proceeding limits the time frame upon which PCI will be judged to a discreet and specific period "... subsequent to August 29, 2001..." See, Order To Show Cause, FCC 02-32, released February 6, 2002, at paragraph 6 (a). Therefore, the Bureau's request for documents concerning PCI matters before the designated commencement date of inquiry is irrelevant to the matters at issue in this proceeding, and is merely an attempt to unduly expand the scope of the inquiry in its discovery to matters that are nor relevant in the instant proceeding.

of Alaska in addition to these seven FM translators, but PCI's past and present operation of these full power stations is not at issue in this proceeding.

2. Specifically, the designated issues before the Presiding Judge in the proceeding are as follows:

- (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001), and related violation of Section 416(c) of the Act;
- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has the requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked.

The Bureau through its discovery requests is apparently attempting to begin an inquiry into PCI's operation of its full power AM and FM stations and into PCI's private advertising, financial, and other business operations in connection with those full power stations. The Bureau argues generally in its Motion that in the Bureau's opinion such discovery into the operation of PCI's full power stations may lead to the discovery of admissible evidence relevant to PCI's operation of the subject FM translator stations, but it doesn't support this argument with anything more specific than that general assertion. PCI submits that a blanket attempt by the Bureau to investigate the private business practices of PCI, and to receive highly confidential and highly private financial and business documents, is unwarranted.

3. As the Bureau is undoubtedly aware, Commission licensees of FM translator stations are prohibited from selling local advertising on those translators

or from broadcasting locally input advertising material. Section 74.1231² of the Commission's rules specifically prohibits the broadcast of local advertising or other locally produced commercial matter in connection with the operation of an FM translator station. PCI does not, and has not, inserted and/or broadcast local advertising announcements on any of its FM translator stations. There is nothing within the body of the issues designated against PCI in this proceeding to suggest that PCI has violated this Commission rules and has broadcast locally produced advertising on any of its FM translators.

4. PCI's sources of income (solely from the operations of its full power stations), annual gross income (solely from the operations of its full power stations), advertising practices (solely in connection with its full power stations), advertisers (who solely purchase advertising on PCI's full power stations), and overall financial operations are irrelevant to the designated issues, are all highly confidential and private business matters of PCI that are unconnected in any way to the operation of the subject FM translator stations, and are beyond the scope of the issues and the legitimate areas of inquiry in this hearing proceeding. In attempting to compel PCI to produce documents on these highly confidential and private business matters, the Bureau is unduly attempting to widen the scope of this proceeding without good cause to inquire into PCI's financial operations at its full power stations, and is merely engaging in a "fishing expedition" for highly confidential and private business information of PCI that is irrelevant to the matters at issue herein. Moreover, the requested information is not likely to produce any evidence

² 47 CFR 74.1231.

that is relevant to the PCI's operation of the subject FM translator stations over the period in question, or which would be admissible at the hearing in this proceeding.

II. THE SPECIFIC DOCUMENT REQUESTS THAT ARE THE SUBJECT OF
THE BUREAU'S MOTION.

A. TECHNICAL RECORDS FOR ALL OF PCI'S BROADCAST STATIONS.

Document request No. 1: All documents relating to the maintenance of each Station's technical operations or the supervision of such activities, grouped by Station, including all documents relating to communications between PCI and any personnel involved in maintaining each Station's technical operation.

5. This vividly demonstrates how far a field the Bureau is going in its discovery attempt. This request would require PCI to go to the extremely difficult and time consuming process of producing all of its operating documents, logs and other technical records for all of its stations, including its full power AM and FM stations. Obviously, the operating documents, logs and other technical records for PCI's full power stations have nothing to do with the operation of the subject FM translator stations, and such documents and records cannot possibly produce evidence on the operation of the FM translator stations that would be the least bit relevant, much less admissible as evidence, in connection with the designated issues in the proceeding.

6. Moreover, as to its FM translator stations, PCI has admitted that it has continuously operated these stations during the period in question in this proceeding.³ Maintenance records, such as may exist⁴, would have no probative value in this proceeding other than to confirm that which PCI has already admitted... it has continued to operate its FM translators since August 29, 2001.

³ See PCI's responses to the Bureau's request for admissions.

⁴ Section 74.1281 of the Commission's rules does not even require FM translator licensees to keep specific maintenance records for FM translators.

**B. PRIVATE AND HIGHLY CONFIDENTIAL BUSINESS AND FINANCIAL
RECORDS OF PCI**

Document Request No. 2: All documents identifying the persons responsible for the financial operations of PCI alone including those responsible for receiving and processing payments to and from PCI.

Document Request No. 3: All documents relating to the determination of charges to advertisers.

Document Request No. 4: All documents relating to PCI's communications with advertisers, including agreements and contracts with advertisers, customer files, and billing files.

Document Request 5: All documents relating to PCI's determination of advertising rates and terms for the Stations it manages or controls.

Document Request 6: All documents relating to the preparation of any budget of capital or operating expenses for PCI along (as opposed to PCI as defined by definition a. above), and for each Station.

Document Request 7: Copies of all property insurance policies insuring the property of PCI alone (as opposed to PCI as defined by definition a. above), including property at each of its Stations.

Document Request 8: Federal income tax returns and schedules and supporting documentation such as financial statements, including profit and expense statements, to the extent that the information contained therein reflects revenues, losses, deductions or exemptions generated as a result of PCI and/or Station operations.

Document Request 9: All documents relating to the distributions of (a) gross revenues and (b) profits from the operation of each of the Stations.

Document Request 10: All documents relating to use of the Stations' property as security or collateral for any loan.

Document Request 11: All Documents relating to telephone, electric, or other utility bills relating to operation of each Station.

7. As noted previously, PCI is prohibited from selling advertising on its FM translator stations, and has never done so. PCI's financial operations in connection with its other, full power AM and FM stations are not in question in this proceeding. The Bureau's request for highly confidential and private financial information, including

Federal income tax returns, financial statements, and records on charges made to advertisers for advertising, which relate solely to PCI's full power stations, is totally unjustified and seeks information that cannot possibly lead to admissible evidence on the operation of PCI's FM translator stations. The Bureau's attempt to compel PCI to turn over such highly confidential business information in connection with stations whose operations are not the subject of this proceeding can only be viewed as harassment of PCI in the guise of discovery.

C. REQUESTS FOR DOCUMENTS AND RECORDS THAT ARE PRESENTLY IN THE POSSESSION OF THE COMMISSION.

Document Request No. 12: All documents relating to any FCC application filed by, or license granted to PCI alone (as opposed to PCI as defined by definition a. above) other than those related to the captioned Stations.

8. Here, the Bureau is asking for documents that are presently in its possession. To the extent that PCI has filed applications with the Commission, and has had licenses granted to it, those records are within the possession of the Commission and readily available for the Bureau's review. PCI would note, moreover, that in its Request For Production of Documents PCI sought all of the PCI applications and licenses that had been filed with, and issued by, the Commission. The Bureau objected to producing these documents since they were, allegedly, available for public inspection to PCI pursuant to section 0.460 and 0.461 of the Commission's rules. Presumably, therefore, such records are readily available to the Bureau as well.

9. The documents requested by the Bureau pursuant to this request also relate solely and exclusively to applications filed by, and licenses issued to, PCI other than for the stations that are the subject of this proceeding. To the extent that the request seeks records that are not relevant to the stations before the Presiding Judge, it seeks documents

that are irrelevant herein, of no probative value, and unlikely to lead to admissible evidence in this proceeding.

D. OWNERSHIP AND CORPORATE RECORDS

Document Request 13: All documents related to the ownership interests in PCI by its shareholders, director, officers or others who may or did exercise ownership interests over PCI and/or its assets.

Documents Request 14: All documents which list the former and current shareholders, direction, officers or others who may or did exercise management control of PCI.

Document Request 15: The corporate minutes and related documents of PCI alone (as opposed to PCI as defined by definition a. above) since December 4, 1990 (the date of release of the Commission's Report and Order in MM docket 88-140, In the Matter of Amendment of Part 74 of the FM (sic) Commission's Rules concerning Translator Stations).

10. PCI produced documents in response to Request No. 13 and stated that it had no documents responsive to Request No. 14 and Request No. 15. Obviously, PCI cannot be compelled to produce documents that don't exist, but it will agree to confirm its previous responses to these requests.

E. DOCUMENTS "RELATING TO PCI'S DETERMINATION OF THE APPROPRIATE SALE PRICE FOR THE FM TRANSLATOR STATIONS IDENTIFIED IN ITS 1996 CONTRACT WITH COASTAL BROADCAST COMMUNICATIONS, INC."

11. PCI responded to this request by indicating that no such documents exist. Obviously, PCI cannot be compelled to produce documents that don't exist, but it will agree to confirm its previous response to this request.

Wherefore, PCI respectfully requests that the Presiding Judge deny the Bureau's attempt to start a "fishing expedition" on matters that are irrelevant to the designated issues in this proceeding, and deny the subject Motion.

Respectfully submitted,

Peninsula Communications, Inc.

By: 

Jeffrey D. Southmayd

Its Attorney

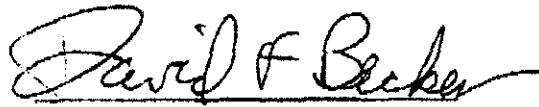
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Date: May 31, 2002

DECLARATION OF DAVID BECKER

I, David F. Becker, President of Peninsula Communications, Inc. do hereby swear and affirm, under penalty of perjury, that I have reviewed this **OPPOSITION TO THE MOTION TO COMPEL PRODUCTION OF DOCUMENTS** and that the responses contained herein, except those of which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

May 31, 2002

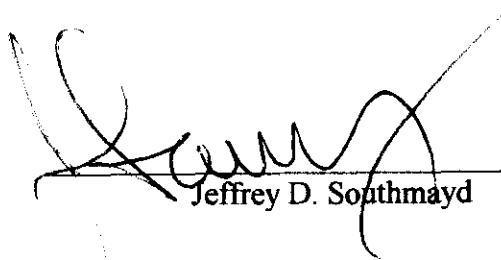
A handwritten signature in black ink, reading "David F. Becker". The signature is written in a cursive style with a horizontal line underneath the name.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by first class United States mail, postage pre-paid, and telecopier on this 31st day of May 2002, to the following:

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Mr. James Shook
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